



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-85-27

### FACTS:

You are a full-time employee of state agency ABC. You were recently contacted to ascertain your interest in preparing, outside of normal working hours, a visual and tactile map of the campus of DEF Community College (DEF). The work would be paid for under a contract with DEF. DEF has not publicly advertised in a newspaper the availability of the contract. DEF has initially contacted three educational institutions, Perkins School, Boston University and Boston College, which it believes can potentially provide names of qualified mapmakers and is in the process of contacting other vendors and potential referral sources.

### QUESTION:

1. If you were selected by DEF, would you have a financial interest in a state contract for the purposes of G. L. c. 268A, s. 7?
2. Has the process of soliciting qualified mapmakers satisfied the "public notice" requirement for an exemption under s. 7(b)?

### ANSWER:

1. Yes.
2. Yes.

### DISCUSSION:

As a full-time ABC employee, you are a state employee for the purposes of G.L. c. 268A. Absent compliance with an exemption, a state employee is prohibited by G.L. c. 268A, s. 7 from having a financial interest in a contract made by a state agency. The prohibition is preventative, and it applies irrespective of whether a state employee has actually used insider influence to acquire the contract. See, Buss The Massachusetts Conflict of Interest Law: An Analysis, 45 B.U.L. Rev. 299, 374 (1965). If selected to perform the map work for DEF, you would have a financial interest in a contract made by a state agency within the meaning of s. 7. See, EC-COI-81-126.[1]

In 1982, the General Court amended s. 7(b) and eased somewhat the absolute prohibition as it applied to full-time state employees. St. 1982, c. 612. The standards, set forth in the footnote below,[2] are generally self-explanatory. However, the facts in

your opinion request raise the question of whether you would satisfy the "competitive bidding" or "public notice" conditions of s. 7(b). Based upon the information you and DEF officials have provided, the Commission concludes that the DEF process of soliciting qualified mapmakers satisfies the s. 7(b) "public notice" requirement.

The Commission has recognized that, in the personal service contract area, the requirements of the competitive bidding process may not be practical. See, EC-COI-83-35; 84-10. In such situations, the Commission looks at the solicitation and advertising process to determine whether there are sufficient vestiges of openness and whether equal access to the position has been provided to the general public. EC-COI-83-95. The Commission has been flexible in the type of advertising necessary for a s. 7(b) exemption, for example, by permitting advertising in trade or professional journals designed to be circulated to all eligible appointees within the geographic area. EC-COI-83-97. In EC-COI-83-56, the Commission advised a state employee who owned a travel business that compliance with s. 7(b) required an interested state agency to contact other travel agencies in order to compare terms. At a minimum, the Commission requires a good faith effort to notify all qualified individuals. In reviewing the process for soliciting names of qualified mapmakers, it appears that DEF has initiated a process designated to reach all qualified individuals in the geographic area. Given the limited number of mapmakers available to perform the specialized DEF contract, a solicitation process which is designed to reach all such mapmakers, even if not advertised in a professional journal, would be sufficient for the public notice purposes of s. 7(b). Compare, EC-COI-85-7 (a process limited to word of mouth to three institutions to solicit names for "a representative of the public" on a state regulatory board does not satisfy the public notice requirement). As long as you comply with the remaining conditions under s. 7(b), your financial interest in the DEF contract will be exempt from s. 7.

DATE AUTHORIZED: April 2, 1985

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[1] These citations refer to previous advisory opinions issued by the Commission. Copies of these and all other advisory opinions may be obtained at the Commission's offices.

[2] Section 7 does not apply

b) to a state employee other than a member of the general court who is not employed by the contracting agency or an agency which regulates the activities of the contracting agency and who does not participate in or have official responsibility for any of the activities of the contracting agency, if the contract is made after public notice or where applicable, through competitive bidding, and if the state employee files with the state ethics commission a statement making full disclosure of his interest and the interests of his immediate family in the contract, and if in the case of a contract for personal services

(1) the services will be provided outside the normal working hours of the state employee.

(2) the services are not required as part of the state employee's regular duties, the employee is compensated for not more than five hundred hours during a calendar year. and

(3) the head of the contracting agency makes and files with the state ethics commission a written certification that no employee of that agency is available to perform those services as a part of their regular duties.